Joint will of spouses in Russian and foreign legislation: a comparative research

Voluntad conjunta de los cónyuges en la legislación rusa y extranjera: una investigación comparativa

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ABSTRACT

We made a comparative analysis between the legislation of Russia and some foreign countries on the joint will of spouses by methods of scientific knowledge in order to draw conclusions about the prospects of development of Russian legislation using foreign experience. We also considered the legislation on the general will of spouses and checked the the features of the joint will of spouses under the legislation of Germany, England, Ukraine and other countries. We prepared some proposals for improving the legislation of the Russian Federation on the joint will of spouses. The result of the study is the conclusion that the joint will in Russian law is a logical and justified innovation, reflecting a conceptual approach to the disposal of common property of spouses, based on the expansion of the dispositivity in inheritance law.

Kewwords: Spouses, management of property, testament, joint will, joint will, freedom of testament

RESUMEN

Hicimos un análisis comparativo entre la legislación de Rusia y algunos países extranjeros sobre la voluntad conjunta de los cónyuges por métodos de conocimiento científico con el fin de sacar conclusiones sobre las perspectivas de desarrollo de la legislación rusa utilizando la experiencia extranjera. También consideramos la legislación sobre la voluntad general de los cónyuges y verificamos las características de la voluntad conjunta de los cónyuges según la legislación de Alemania, Inglaterra, Ucrania y otros países. Preparamos algunas propuestas para mejorar la legislación de la Federación de Rusia sobre la voluntad conjunta de los cónyuges. El resultado del estudio es la conclusión de que la voluntad conjunta en la ley rusa es una innovación lógica y justificada, que refleja un enfoque conceptual para la disposición de la propiedad común de los cónyuges, basada en la expansión del dispositivo en la ley de herencia.

Palabras clave: cónyuges, gestión de la propiedad, testamento, testamento conjunto, testamento conjunto, libertad de testamento

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INTRODUCTION

Testament since Roman law is the basis of inheritance (Justinian, 2002).

The legislation of the Russian Federation and foreign countries sets forth legal norms that define the concept of a testament, its forms, and provide for rules on the freedom of the testament. Despite the stability of the main provisions, there is a global trend of reforming the inheritance law. Thus, in England, there is a reform of the legislation on the testament (Wills, 2017). In December 2011, the Legal Commission of England published a report "Intestacy and Family Provision Claims on Death", which prepared amendments to the Act on Succession 1975 (Intestacy, 2011). In the Russian Federation, the modernization of legislation consists in the emergence of new legal structures, which are often borrowed from foreign legislation. In recent years, norms have been adopted on the inheritance fund, inheritance contract and joint will of spouses. In order to understand the essence of these categories, to identify their features and prospects for development, it is useful to conduct a comparative legal analysis of Russian and foreign legislation, the application of best foreign practices, which will allow, among other things, to outline the prospects for the application and improvement of domestic legislation.

Federal Law No. 217 of 19 July 2018 "On Amendments to Article 256 of Part One and Part Three of the Civil Code of the Russian Federation (Collection, 2018), in article 1118 of the Civil Code of the Russian Federation (Civil, 2001) (hereinafter - the Civil Code of the Russian Federation), additions are made on the joint will of the spouses. As of 1 June 2019, the testament may be made not only by one citizen, but also by citizens who are married to each other at the time of its commission (joint will of the spouses) (paragraph 4 of Article 1118 of the Civil Code). For Russian legislation, the joint will of spouses is a new legal phenomenon.

A comparative legal analysis of foreign legislation has shown that different legal systems have different approaches to the joint will of spouses. The legislation of many countries, such as Germany, Austria, Ukraine and Bulgaria, provides such an opportunity for spouses for a long time. In some countries (Germany, Austria, Ukraine, Georgia, Azerbaijan) it can be performed only by spouses, in others the right to perform it is granted not only to spouses, but also to other persons, in particular officially registered partners (England, USA, Latvia).

In other countries, on the contrary, there are no joint wills of spouses. The inheritance law of the Kingdom of Spain excludes the possibility of drafting a joint will of the spouses (Begichev, Strelchenko, 2019). The testament is personal in nature and manifests itself in the prohibition of making a testament jointly by several persons (Article 669 of the Spanish Civil Code) (Codigo Civil, 1989). Article 968 of the French Civil Code prohibits both joint and mutual wills (Delage, 2011). The legislative sources of English inheritance law include: The Testaments Act of 1837, the Heritage Administration Act of 1925, the Inheritance (Family Welfare) Act of 1938, the Inheritance (Family Welfare) Act of 1952, the Inheritance Tax Act of 1984.

The Anglo-American legal tradition uses a different category instead of the notion of a joint will, and the distribution of the deceased's property is done, with some exceptions, through the courts. Property is distributed either by probate or, if there is no valid testament (intestacy), by dispositive rules of inheritance law, including statute and case law (Dukeminier, Sitkoff, 2015). In addition to the customary testament, Anglo-American law may use instruments such as a lifetime trust, testamentary trust, testamentary contract, mutual testament. Most often, mutual wills are composed of spouses (Sawyer, Spero, 2015) and, in fact, they are two separate testaments, which are irrevocable by agreement of the parties. Because there are no rules on the transfer of property after the death of one spouse to the other in the Anglo-American order (Roberts, 2012). Mutual wills are used in both England and the United States. However, there are plans to limit their use or even deprive citizens of the opportunity to make them (Kerridge, 2011).

The diversity of approaches in the legislation to such a legal phenomenon as a joint will requires an analysis of its main provisions, their evaluation and the expediency of using the best practices in the Russian legal system.

DEVELOPMENT

Methods

The methodological basis of this research is the general and private methods of scientific research, in particular, the method of comparative jurisprudence, deduction, comparative, complex analysis, system analysis, logical laws and rules, theoretical analysis, modeling, method of mental experiment and evidence.

The materials of this research are the norms of foreign and Russian legislation on inheritance, scientific concepts and categories developed by the theory of law and civil engineering, which are used to study public relations and their regulation by the current legislation.

Results and discussions

In the Russian scientific literature, a lot of attention is paid to the joint will of spouses under the legislation of Germany (Liew, 2016), which is due to the proximity of legal systems. According to the German Civil Code, only spouses can make a general testament (§ 2265 GCC) (Gongalo et al., 2015). This means that other persons, regardless

of the proximity and trust of their relationship, cannot make a joint will. The theory of German inheritance law distinguishes between the following types of law. Testamenta correspectiva is a joint will in which one spouse's obligations depend on the other spouse's obligations (gegenseitig, abhangige, korrespektive Testamente, the so-called mutually dependent, mutual will).

The obligations of one spouse must remain valid for as long as the obligations of the other remain valid, and it will be decisive in this case whether the spouses want such dependence. An example of this type of testament, when the husband and wife bequeath each other, as well as their children all their property. In such cases, the spouses want the obligations to be mutual (§ 2270 GCC). Such type of joint will as Testamenta reciproca is spoken about when spouses doubt each other, or if one of the spouses doubts in the interests of the other (gegenseitige Testamente - mutual, mutual wills). There is an intrinsic link between the two, but these obligations should not be reciprocal at all. In other words, there should be no relationship between the two obligations and thus the performance of one does not depend on the performance of the other.

Testamenta mere simultanea is a joint will that summarizes the obligations of the spouses, but does not have the character of reciprocity or reciprocity. In this case, the spouses resort only to formal aspects, that is, directly to the preparation of the testament, for example, in the testament drawn up by one spouse, in consequence of signed by both spouses, each of them appoints heirs of children from the previous marriage (Putintseva, 2015).

The State University establishes a written form of joint will. It can be made by one of the spouses in the required form, and the other spouse personally signs a joint statement. The joint will of the spouses may be drawn up in a notary office signed by a notary public, and under certain conditions it may be made in the presence of the mayor (emergency testament). It is also possible to draw up an oral testament of the spouses in the presence of three witnesses (emergency testament in special cases) (§ 2267 of the State University).

As noted in the literature, the truncated circle of subjects who have the right to make a general testament is primarily due to the special trust and personal nature of the relationship between them, as a result of which the spouses usually have no secrets from each other. It is also assumed that since the spouses live together and share a common household, they often wish to work together not only to solve everyday problems but also to coordinate their orders in the event of death. It is also indicated that from the substantive point of view, the joint will of the spouses consists of two declarations of testament, in which each of them disposes of their property unilaterally.

However, both testaments form a joint act, when there is a clear testament of the testators to establish a uniform order of inheritance. The peculiarity of the legal structure of a joint will is that it is a single transaction containing two unilateral expressions of testament. A joint will does not necessarily have to be a single document, and the orders of each spouse may differ in content. Within the framework of a joint will, the testament of each spouse retains its legal independence (Budylin, 2017).

The joint will of the spouses does not automatically terminate upon termination of the marriage. If the marriage is terminated before the death of one of the spouses, the joint will remains in force insofar as it is assumed that it would have been made in this case (paragraph 2 § 2268 GCC). The invalidity of the marriage results in the invalidity of the joint will (Section 2268(1) of the GCC).

As noted by E.P. Putintseva, the analysis of the German law allows us to conclude that the joint will is a logically verified institution of German inheritance law, which provides the spouses with numerous opportunities to choose a specific option of succession. The flexibility of German law provides a greater degree of freedom of the testament, allowing the spouses to draw up a legal act that fully meets their interests and corresponds to their personal ideas about a fair inheritance succession (Putintseva, 2015).

Joint will of spouses is provided by the legislation of the former Soviet republics, in particular by the Civil Code of Ukraine. The joint will of the spouses of the Civil Code of Ukraine is dedicated only to one article - Article 1243, which states that the spouses have the right to make a joint will. When they do so, they can only dispose of joint property. The joint will of the spouses is made in writing and is subject to notarization. Each of the spouses has the right to refuse from the joint will of the spouses during their lives. Such refusal must be notarized. In the event of the death of one of the spouses, the bequests pass to the widow/widower, but the notary imposes a ban on the alienation of property specified in the joint will of the spouses. In the event of the death of a widow/widower, the property shall be transferred to the heirs of the testament indicated in the joint will of the spouses. The dissolution of the marriage shall terminate the joint will.

After the death of the husband or wife, it is no longer possible to change the joint will. Each spouse, besides the joint will, has the right to make a single will, disposing of the property belonging to him personally. The right to make a single will remain with the surviving spouse. The surviving spouse may only dispose of personal property, not joint property.

Even more concisely, the Civil Code of Georgia establishes a joint will of the spouses, dedicating one sentence to such a testament. Article 1347 provides that only spouses can make a joint will on mutual inheritance, which can be changed at the request of one of the spouses, but still in the life of both spouses.

Russian legislation provides for special regulation of the joint will. According to paragraph 4 of Art. 1118 of the Civil Code of the Russian Federation in the joint will of the spouses, they have the right at both discretion to determine the following consequences of the death of each of them, including the one that occurred at the same time: to bequeath the common property of the spouses, as well as the property of each of them to any persons; in any way to determine the shares of heirs in the respective hereditary mass; to determine the property included in the hereditary mass of each of the spouses, if the definition of the property included in the hereditary mass of each of the spouses, does not violate the rights of third parties; to deprive the inheritance.

The terms of the joint will of the spouses are valid in part, not contradicting the rules of the Civil Code of the Russian Federation on the mandatory share in the inheritance (including the mandatory share in the inheritance, the right to which appeared after the joint will of the spouses), as well as the prohibition of inheritance unworthy heirs (Art. 1117 of the Civil Code).

Thus, when making a joint will the spouses dispose of the common property of the spouses and separate property of each of them. In this case, they form the hereditary mass of each of them. The hereditary mass of each of the spouses, we believe, may be different. It can be the same in terms of the value of the property of the spouses or different, because the options for the disposal of property are invented by the spouses themselves. For example, the hereditary mass of one of the spouses is formed only from real estate, and the hereditary mass of the other spouse - from movable property, so its value is different.

Separate property of one of the spouses can be included in the hereditary mass of the other spouse and vice versa. But in this case, the rights of third parties should not be violated. However, the law does not give the concept of "third parties". Since in the joint will of the spouse can make the same orders as in the sole testament, about the mandatory share, and therefore, the necessary heirs said separately, and the rules on the responsibility of heirs to the debts of the possible testator apply to the heirs of the joint will of the spouses, it is not clear what third parties we are talking about. Since all participants of the hereditary legal relationship and those involved in it are determined, it is advisable to remove the reference to third parties from paragraph 4 of Art. 1118 of the Civil Code (Civil Code, 2001).

In addition, it seems erroneous to point out that the conditions of the joint will of the spouses act in part to prohibit inheritance by unworthy heirs. Under Art. 1117 of the Civil Code of the Russian Federation the testator can forgive his unworthy heir by bequeathing him property. Therefore, there are no objective reasons for the deprivation of this right of the spouses, making a joint will.

The law does not indicate the creation of a joint will of the spouses of the hereditary fund, which should be attributed to its shortcomings. If the husband began to engage in commercial activity during the marriage, then half of the share in the authorized capital of the spouse participating in the commercial organization belongs to the other spouse. Spouses may be engaged in certain business together. Therefore, it is not accidentally indicated in the literature that the execution of a joint will would contribute to the management of the business (Gongalo et al., 2015). In this regard, it would be correct to grant the right to spouses to create a joint will to create a hereditary fund.

The joint will of the spouses should be stated in writing. The literature has expressed the erroneous opinion that the form of joint will of spouses is not provided for in the law (Amirov, 2016; Budylin, 2017). It should be transferred to the notary by both spouses or recorded with their words by a notary in the presence of both spouses. Only a testament written by the spouses may be given to the notary. It may not be in the form of a closed or emergency testament. The joint will of spouses has no right to certify the person whose certificate is equated to a notary (paragraph 1 of Art. 1125 of the Civil Code). These prohibitions significantly limit the freedom of the testament, since spouses will not be able to make a testament if there is no notary in their place of residence or they will have to bear additional costs. In this matter, the legislation of Germany is more progressive, allowing, under certain conditions, for an oral joint will of the spouses in the presence of three witnesses.

A great mistake is a ban on making a testament using electronic or other technical means (paragraph 2, paragraph 1, Article 160 of the Civil Code of the Russian Federation). First of all, electronic technologies are developing so rapidly that it is not excluded that they may be used in due course not only in the preparation of the text of the testament, but also in its certification.

Secondly, there is a contradiction between paragraph 1 of Article 1124 and paragraph 1 of 1125 of the Civil Code of the Russian Federation, because in the latter it is established that technical means (electronic computer, typewriter and others) can be used when writing or recording the testament. In addition, when certifying the joint will of the spouses notary is obliged to carry out the video recording of the procedure of the joint will of the spouses, if the spouses have not objected to it (paragraph 5.1 of Art. 1125 of the Civil Code). But video recording is carried out with the help of electronic resources. Notaries keep electronic registers of notarial actions, including the electronic register of testaments. In this regard, it is necessary to remove paragraphs 3 of paragraph 1 of Article 1124 of the Civil Code of the Russian Federation on the prohibition of the use of electronic resources.

For an unknown reason, it is prohibited for spouses to make a closed testament. When making a joint will the

spouses must first determine that the joint will for them, taking into account the circumstances is a priority. They should discuss all of its terms and conditions and then submit them in writing.

No, we believe that there are no obstacles to the placement of such a testament in an envelope and its deposit with a notary in the presence of two witnesses. If it were possible to make a closed testament, including the spouses, electronically, after the opening of the closed testament, it would be possible to see the condition of the spouses when discussing the making of the joint will. An electronic testament will cause less controversy about the invalidation of the testament because of the testaments' incompleteness.

The possibility of making a testament in electronic form is not provided for by the legislation of other countries of the world. However, this does not mean that the Russian legislator is not entitled to provide for it.

Its features have circumstances of termination of the joint will of spouses, provided by law. The joint will of the spouses can be changed or cancelled by mutual consent of the spouses, which must be notarized. According to paragraph 3 of paragraph 4 of Art. 1118 of the Civil Code of the Russian Federation, the joint will of the spouses becomes null and void in the event of dissolution of the marriage or recognition of the marriage null and void both before and after the death of one of the spouses. This provision contains errors.

Firstly, at the time of death opens the inheritance of the testament, including joint, which begins to be executed. It is in this case that the testament is made. Second, the death of one of the spouses terminates the marriage, so it is impossible to dissolve it after the death of one of the spouses. In this regard, this rule should be removed from the provision on the dissolution of the marriage, leaving only the recognition of the marriage null and void. But, as O.E. Blinkov (2015) correctly notes, "this rule raises the issue of protection of hereditary rights and interests of a conscientious survivor, in the solution of which the analogy of the family law on the marriage contract is appropriate.

For protection of the hereditary rights (exclusively in interests of the survivor of the conscientious spouse) similarly it is possible to arrive and with the joint will of spouses whose marriage will be recognized void after death of one (unfair) from spouses for what entering of corresponding additions in item 30 of the Family Code of the Russian Federation is required" (The Fundamentals, 2013). However, in this case, the relevant additions should be made to Article 1118 of the Civil Code of the Russian Federation.

A joint will also become invalid on other grounds. Some of them are surprising. Thus, one of the spouses has the right at any time, including after the death of the other spouse to make a testament, as well as to cancel the joint will of the spouses (paragraph 5 of Art. 1118 of the Civil Code). It seems that in this case a mistake has been made. After the death of one of the spouses, the widow/widower cannot cancel the joint will, because it begins to be executed in respect of the heirs of the deceased spouse/widower owner. Therefore, it is only possible to cancel the testament to the extent that the testament provides for a testamentary order made in the event of the death of the widow/widower.

The subsequent testament of one of the spouses cancels the joint will of the spouses. It may change the hereditary mass and its distribution among heirs and the composition of heirs. Both direct and indirect cancellation of a joint will by one of the spouses violates its stability.

If the notary certifies the subsequent testament of one of the spouses, accepts his closed subsequent testament or certifies the order of one of the spouses to cancel the joint will of the spouses in the life of both spouses, he is obliged to send to the other spouse notification of the fact of such subsequent testament or the abolition of the joint will of the spouses (paragraph 6 of Art. 1118 of the Civil Code). This provision also raises questions.

As noted in the literature, for the certification of testaments Fundamentals of the legislation of the Russian Federation on notary public (Martasov, 2018) provides a general principle of territoriality. In this regard, the testament can be certified in any state notary office, as well as at any notary engaged in private practice. The place of residence of the testator when notarizing the testament is of no importance (Notarial Law, 2017). This means that one of the spouses who have made a joint will, to cancel it, can certify the sole testament of any notary located in any locality. In this case, the testator is not obliged to inform anyone, including the notary, of the commission, content, change or cancellation of the joint will (paragraph 2 of Art. 1119 of the Civil Code).

Moreover, one of the spouses may cancel the joint will by making a closed testament. The notary may learn about the joint will only in case of its cancellation by one of the spouses. In other cases, he may not know about it, unless a separate register of joint wills of the spouses is kept. Electronic registers of sole and joint wills of spouses will allow the notary to reveal the truthfulness of the explanations of the spouse, making the testament after the certification of the joint will. When using the general register of testaments, the other spouse may not immediately learn about the cancellation of the joint will of the other spouse. In such a case, his interests are ensured only by the fact that one of the spouses cannot dispose of the property belonging to the other spouse when making a single testament. In this regard, the other spouse will not be left without property, but he may not know that the joint will is cancelled and that his property will be transferred, perhaps to persons whom he did not wish to leave him.

There are other provisions in the law on the joint will of spouses that undermine its stability and make it unpromising. A joint will may be challenged in court at the suit of any of the spouses. It is possible to challenge a joint will if, for example, the spouses have made a mistake with regard to possible heirs or bequests. After the death of one or both spouses, the joint will may be challenged by any person whose rights and legitimate interests are violated. Such a person may include, I believe, a possible heir. Creditors of spouses can hardly challenge the joint will, as their rights and legitimate interests cannot be violated by the joint will, because the debts are also part of the inheritance. Thus, when making a joint will, spouses have no confidence in its execution after they leave for the other world. In order to ensure the stability of the joint will of the spouses, it is advisable to enshrine in the law the inadmissibility of its cancellation unilaterally by one of the spouses, both during the life of both spouses and after the death of one of them.

CONCLUSIONS

The trend in Russian legislation in recent years has been the convergence of the provisions of the Civil Code of the Russian Federation with the rules governing the relevant relations in the law of foreign countries, and the use in the civil legislation of the Russian Federation of the latest positive experience in modernizing the civil codes of a number of European and other countries. On this basis, it seems logical and expedient to enshrine in Russian legislation the legal structure of a joint will. It makes it possible to expand the freedom of the testament, and at the same time to take into account the mutual interests of the spouses on the disposal of joint property, including in the event of death. It is worth noting that the joint will as a category of civil law is in conjunction with institutions of such branches of law as: family, tax, housing and with the legislation on bankruptcy and notary public, in which there is no mention of a joint will, which can offset its legal effect.

However, the legal regulation of the joint will cannot be recognized as sufficient; foreign experience shows that it is impossible to limit only one paragraph of the article of the Civil Code, as is the case in the Russian Federation and requires more extensive legal regulation, such as in Germany. Improvement of this is possible due to doctrinal developments, proposals to improve the legislation expressed in this study, for example, to exclude from Article 1118 of the Civil Code of the Russian Federation the reference to third parties as participants in the hereditary legal relationship, from paragraph 3 of paragraph 1 of Article 1124 of the Civil Code of the Russian Federation a ban on the use of electronic resources.

When preparing amendments and additions to the legal material it is necessary to use the results of further analysis of foreign legislation and practice of its application, the legal position of the supreme courts and the formation of the position of the law enforcement officer.

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